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TAKING THE RELIGION OUT OF RELIGIOUS PROPERTY DISPUTES

Abstract: The current trend of local parish suppressions raises fundamental questions regarding ownership of gifted property. Disputes regarding ownership arises when a donor's intent conflicts with the institution's hierarchy claiming ownership of the gifted property. Hierarchical religious institutions like the Roman Catholic Church can assert such claims under two legal principles. First, because the First Amendment requires the separation of church and state, civil courts cannot interpret religious law. Second, because hierarchical religious institutions are often organized as corporations sole, local parishes are agents of the archdiocese. This Note argues for extending neutral principles of law currently used to settle intra-church property disputes to property disputes between religious institutions and individuals. In applying neutral principles of law, including the law of wills and trusts, courts can successfully adjudicate property disputes to ensure a testator's intent is effectuated.

INTRODUCTION

The suppression, or closing, of local parishes as part of a hierarchical church system presents complex problems for the disposition of church property.¹ Because hierarchical churches, like the Roman Catholic Church, are often organized as corporations sole, property that belongs to the local parish may also belong to the higher church body.² Parishioners who set aside assets for the exclusive use by their local parish in wills or charitable trusts may be surprised to find out that upon the suppression of their local parish, the archdiocese often has title to the property.³

In these situations, a fundamental tension exists between the disposition of church property and the actual intent of the donor.⁴ For the most part, these issues are not justiciable by civil courts because the

¹ See WILLIAM W. BASSETT, *RELIGIOUS ORGANIZATIONS AND THE LAW* § 1:17 (2003). Suppression is the closing of a particular local parish. *St. Matthew's Slovak Roman Catholic Congregation v. Most Revered Wuerl*, 106 F. App'x 761, 763 (3d Cir. 2004).

² See BASSETT, *supra* note 1, § 1:17.

³ See *Akoury v. Roman Catholic Archbishop of Boston*, 18 Mass. L. Rptr. 271, 272 (Mass. Super. 2004).

⁴ See *Evans v. Abney*, 396 U.S. 435, 441-42 (1970).

First Amendment requires the separation of church and state.⁵ Depending upon the ecclesiastical framework of hierarchical churches, however, it is sometimes possible for civil courts to sever secular property disputes from religious doctrine and successfully apply neutral principles of law to dispose of the property.⁶

This Note argues for the extension of the neutral principle approach from the context of intra-church disputes to disputes arising between religious institutions and individuals, and suggests how donors can protect their gifted property from transferring to the archdiocese. Part I of this Note provides a synopsis of the concepts and practical implications of hierarchical religious institutions organized as corporations sole.⁷ Part II of this Note explains the First Amendment hurdle that plaintiffs must clear in order to adjudicate this kind of property dispute.⁸ Part III of this Note explores the concepts of severability, neutral principles of law, and specific examples of such secular principles.⁹ Part IV of this Note endorses the extension of the neutral principle approach to property disputes between churches and individual donors and suggests how best to express one's intent so as to prevent an archdiocese from becoming an unintended beneficiary.¹⁰

I. THE CORPORATION SOLE AND RELIGIOUS ORGANIZATIONS

The corporate structure known as the corporation sole often shields religious institutions from civil court interference in property disputes.¹¹ A corporation is an artificial person existing as an entity distinct from that of its members.¹² The corporation is a legal entity created via state law designed to shield its individual members from liability while also providing a legally responsible voice for all who deal through and with the corporation.¹³ A corporation can hold title to property, sue, and be sued in its own name.¹⁴ By creating a separate corporate structure for religious organizations, individual members can avoid personal liability.¹⁵

⁵ U.S. CONST. amend. I.

⁶ See *Jones v. Wolf*, 443 U.S. 595, 603 (1979); BASSETT, *supra* note 1, § 3:6.

⁷ See *infra* notes 11–40 and accompanying text.

⁸ See *infra* notes 41–88 and accompanying text.

⁹ See *infra* notes 89–170 and accompanying text.

¹⁰ See *infra* notes 171–223 and accompanying text.

¹¹ See BASSETT, *supra* note 1, § 1:17.

¹² See *id.* § 3:1.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

Religious organizations can create two types of corporations: aggregate and sole.¹⁶ Corporations aggregate are characterized by multiple people united in form—people who occupy the same office at different times—who are part of a perpetual succession of members that can continue indefinitely.¹⁷ In contrast, corporations sole consist only of one person and that person's successors who are incorporated by law to give them certain legal capacities and advantages, particularly perpetuity.¹⁸ Examples of corporations sole include kings, bishops, parsons, and vicars.¹⁹ Through the corporation sole, the present incumbent and subsequent predecessors are theoretically one and the same, because anything given to one is also given to the others.²⁰

The modern corporation sole emerged from English common law.²¹ At that time, the crown, bishopric and vicarage, by operation of law, were considered continuing and independent entities that held and administered property through a vertical succession of office holders.²² Vertical succession allowed office holders to hold property for the duration of their time in office and to hold it for the benefit of and until replaced by their successor.²³ Today about one-third of the Roman Catholic diocesan bishops in the United States are corporations sole.²⁴ Episcopal dioceses, various Orthodox dioceses, and the bishop of the Church of Jesus Christ of Latter-Day Saints are also organized as corporations sole.²⁵

Corporations sole are creations of state law and must be established by charter or religious incorporation acts.²⁶ Legislative action is required because corporations sole cannot arise by operation of law because the First Amendment, as applied to the states by incorporation through the Fourteenth Amendment, requires church disestab-

¹⁶ See ROBERT S. STEVENS & HARRY G. HENN, STATUTES, CASES, AND MATERIALS ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 8 (1965).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* at 8–9.

²¹ See BASSETT, *supra* note 1, § 1:17 (citing HOWARD LEONER OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS 33 (5th ed. 1988)).

²² See *id.*

²³ See *id.*

²⁴ See *id.* (citing James B. O'Hara, *The Modern Corporation Sole*, 93 DICK. L. REV. 23, 24 n.11 (1988)).

²⁵ See *id.*

²⁶ See *id.* The Roman Catholic Archdiocese of Washington, D.C., is the only federally incorporated corporation sole, and was created by a special act of Congress in 1948. BASSETT, *supra* note 1, § 1:17.

lishment.²⁷ Seventeen states have statutes that explicitly recognize the corporation sole.²⁸ At least eight other jurisdictions have utilized a special charter to create one or more corporations sole.²⁹

Exceptions to the general rule—that corporations sole no longer arise by implication of law and must be created by state law—exist in (1) Florida, where the state supreme court held that the common law corporation sole is still valid; (2) Arkansas, where the state supreme court held that without a special legislative act, the Roman Catholic Bishop of Little Rock is recognized as a corporation sole; and (3) Delaware, where the Roman Catholic Diocese of Wilmington is a one-person corporation under the state's General Corporation Law instead of a corporation sole incorporated under the Delaware Code for Religious Societies and Corporations.³⁰

A corporation sole provides a simple and efficient method of centralized control.³¹ Moreover, and more importantly, disputes regarding the use and ownership of property as well as civil accountability for church assets are usually nonjusticiable issues for civil courts.³² Thus, a corporation sole protects churches from use and ownership disputes because these disputes often cannot be resolved by civil courts.³³ The ability to remove church property disputes from a civil court's jurisdiction is the major reason why many states do not allow the creation of corporations sole and prefer to provide for a trustee or membership corporation for religious organizations.³⁴ Under a cor-

²⁷ See U.S. CONST. amends. I, XIV; *Wright v. Morgan*, 191 U.S. 55, 59 (1903). In 1903, in *Wright v. Morgan*, the U.S. Supreme Court noted that the law does not recognize the bishop as a corporation sole unless incorporated as such by statute. *Id.* Disestablishment of religion is the separation of church and state which prevents religious institutions from establishing their beliefs as law and from receiving financial support from the state. See BASSETT, *supra* note 1, § 2:1.

²⁸ See ALA. CODE §§ 10-4-1 to -9; ALASKA STAT. § 10-40.060; ARIZ. REV. STAT. ANN. §§ 10-421 to -426; CAL. CORP. CODE §§ 10000-10015; COLO. REV. STAT. §§ 7-52-101 to -104; HAW. REV. STAT. §§ 419-1 to -9; IDAHO CODE § 30-304; MICH. COMP. LAWS §§ 458.1-2, 458.271-.273; MONT. CODE ANN. §§ 35-3-101 to -209; NEV. REV. STAT. §§ 84.010-.080; N.H. REV. STAT. ANN. §§ 306.6-.8; N.C. GEN. STAT. § 615; O.R. REV. STAT. § 65.067; S.C. CODE ANN. § 33-31-140; UTAH CODE ANN. §§ 16-7-1 to -12; WASH. REV. CODE §§ 24.12.010-.040; WYO. STAT. §§ 17-8-109 to -113; BASSETT, *supra* note 1, § 1:17.

²⁹ See BASSETT, *supra* note 1, § 1:17. Those jurisdictions include the District of Columbia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Nebraska, and Rhode Island. See *id.*

³⁰ See 8 DEL. CODE ANN. § 101; *Little Rock v. Linn*, 432 S.W.2d 455, 462 (Ark. 1968); *Hurley v. Werly*, 203 So. 2d 530, 532 (Fla. 1967).

³¹ See BASSETT, *supra* note 1, § 1:17.

³² See *id.*

³³ See *id.*

³⁴ See *id.*

poration sole, church members must rely almost exclusively upon internal canons and church bylaws for accountability and recourse regarding resolution of property disputes with the church.³⁵ Relying on religious documents containing these canons and bylaws often requires interpretation of canon law, something a civil court cannot do, thus removing the majority of church disputes from civil courts.³⁶

In addition to the distinction between corporations sole and aggregate, churches can also be incorporated according to different structural frameworks.³⁷ Congregational churches are self-governed and are described as independent entities without obligation to a higher authority.³⁸ Unlike churches that are congregational in structure and based on the will of the majority, hierarchical churches place the final decision-making authority in the ecclesiastical body that is superior to the local congregation.³⁹ Local parishes are subordinate to the higher church unit and to the church tribunal, which retains ultimate authority and decision-making capabilities.⁴⁰ It is this hierarchical structure—in which a higher church unit may retain decision-making authority over the local church unit—that is the source of tension when a parish is suppressed and ownership of church property is called into question.

II. CONSTITUTIONAL APPROACHES TO RESOLVING PROPERTY DISPUTES

In addition to relying on corporate structures, religious institutions can also insulate or protect their assets by creating and documenting the appropriate "church polity."⁴¹ Church polity describes the inner workings and organizational framework of religious entities, their methods of governance, and the manner in which churches implement their doctrines and religious commitments.⁴² Church polity determines the relationship between local churches and the national denomination.⁴³ Because church polity is usually ecclesiastical in nature, it is of-

³⁵ *See id.*

³⁶ *See* Jones v. Wolf, 443 U.S. 595, 604 (1979); BASSETT, *supra* note 1, § 1:17.

³⁷ *See* BASSETT, *supra* note 1, § 3.3.

³⁸ *See id.*

³⁹ *See* Watson v. Jones, 80 U.S. 679, 682 (1872); BASSETT, *supra* note 1, § 3:3.

⁴⁰ *See* Watson, 80 U.S. at 682; BASSETT, *supra* note 1, § 3:3. This Note uses the terms "local parish" and "higher church unit" in a broad sense as opposed to specifically naming the organization of a single religion because this subject matter is applicable to numerous hierarchical religious institutions.

⁴¹ *See* Jones v. Wolf, 443 U.S. 595, 603-04 (1979).

⁴² *See* BASSETT, *supra* note 1, § 3:2.

⁴³ *See id.*

ten not subject to judicial determination.⁴⁴ For this reason judicial determination of an ecclesiastical dispute would violate the First Amendment.⁴⁵

Religious protections provided by the First Amendment, as incorporated through the Fourteenth Amendment to be applicable to the states, present the initial obstacle that plaintiffs must overcome when seeking to adjudicate church property disputes.⁴⁶ The First Amendment not only protects individuals from the federal government's intrusion into religious doctrines, but also serves to protect the liberty of churches and religious organizations.⁴⁷ The First Amendment forbids Congress from enacting any law respecting the establishment of religion and from prohibiting the free exercise of religion.⁴⁸

The First Amendment's Establishment Clause guarantees individuals that the federal government will not use its resources to impose or advance religion.⁴⁹ Additionally, the Free Exercise Clause guarantees that the federal government will not interfere with an individual's right to pursue religious beliefs of their choosing.⁵⁰ These prohibitions are designed to limit the federal government's influence over an individual's religious beliefs and its oversight of religious institutions.⁵¹ The U.S. Supreme Court, however, distinguishes between the absolute freedom of religious beliefs and the limited freedom to act upon those beliefs.⁵² Religious organizations cannot use the First Amendment to shield themselves from civil liability when disputed conduct falls outside the scope of religious beliefs and doctrine.⁵³

The activities of religious corporations are governed by their own internal laws.⁵⁴ Because the religious corporations are creations of the state, canon law is necessarily and indirectly enforced in civil courts to the extent that such issues overlap with non-religious issues.⁵⁵ Leading Supreme Court decisions hold that when issues arise regarding inter-

⁴⁴ See *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 3:2.

⁴⁵ See *Jones*, 443 U.S. at 602.

⁴⁶ See *id.*

⁴⁷ See U.S. CONST. amends. I, XIV; *Jones*, 443 U.S. at 603-04.

⁴⁸ U.S. CONST. amend. I; see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

⁴⁹ See U.S. CONST. amend. I, cl. 1; *Cantwell*, 310 U.S. at 303; BASSETT, *supra* note 1, § 7:20.

⁵⁰ See U.S. CONST. amend. I, cl. 1; *Cantwell*, 310 U.S. at 303; BASSETT, *supra* note 1, § 7:20.

⁵¹ See *Cantwell*, 310 U.S. at 303; BASSETT, *supra* note 1, § 2:1.

⁵² See *Cantwell*, 310 U.S. at 303.

⁵³ See *Jones*, 443 U.S. at 605; BASSETT, *supra* note 1, § 7:20.

⁵⁴ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 3:6.

⁵⁵ See *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 3:6.

nal canon law, organizational discipline of churches, or resolution of property disputes within churches, civil courts must defer to the judgments of the religious corporation's own canon laws and regulations.⁵⁶ When ecclesiastical controls are absent or do not clearly resolve the matter in dispute, however, secular courts are empowered to intervene with the application of neutral principles of civil law.⁵⁷

Neutral principles of law allow courts to apply secular legal theories, such as property or contract law, to disputes involving religious organizations without violating the First Amendment.⁵⁸ Civil courts are an appropriate forum for resolving church property disputes when neutral principles of law can be applied.⁵⁹ The reason for this is that when ecclesiastical issues are not at stake, neither the Establishment Clause nor the Free Exercise Clause of the First Amendment is violated by government resolution of these disputes.⁶⁰ Because no constitutional barrier is present for state action in these situations, states may resolve disputes over church property through state courts by using neutral principles of law and need not adopt rules of compulsory deference to religious authorities in resolving such disputes.⁶¹

Thus, there is a clear distinction between disputes involving the internal structure and organization of a church—over which civil courts have no jurisdiction—and disputes involving the disposition of property that belongs to a religious institution—over which civil courts do have jurisdiction because resolution is achieved through secular laws of property, trust, and contract.⁶²

In 1872, *Watson v. Jones* was the U.S. Supreme Court's first case regarding a dispute over church property.⁶³ Although the schism that triggered the dispute was a result of opposing views on slavery and began as an internal theological debate over morals, the involved church factions each claimed entitlement to use of the church.⁶⁴ The

⁵⁶ See *Jones*, 443 U.S. at 603–04; *Watson v. Jones*, 80 U.S. 679, 729–31, 733 (1872). *Watson* and *Jones* created the key concepts of judicial deference to ecclesiastical authority within hierarchical religious structures and severability of secular legal issues from religion without violating the First Amendment so that civil courts can adjudicate church property disputes. See *Jones*, 443 U.S. at 603–04; *Watson*, 80 U.S. at 729–31, 733; BASSETT, *supra* note 1, § 3:6.

⁵⁷ See *Watson*, 80 U.S. at 602; BASSETT, *supra* note 1, § 3:6.

⁵⁸ See *Jones*, 80 U.S. at 603.

⁵⁹ See *id.* at 602; BASSETT, *supra* note 1, § 7:18.

⁶⁰ See *Jones*, 80 U.S. at 602; BASSETT, *supra* note 1, § 7:18.

⁶¹ See *Jones*, 80 U.S. at 604–05.

⁶² See *Jones*, 80 U.S. at 602–03; BASSETT, *supra* note 1, § 7:18.

⁶³ See *Watson*, 80 U.S. at 705.

⁶⁴ See *id.* at 692.

Supreme Court ultimately decided that it could not determine which of the two factions actually represented the church and therefore controlled the property.⁶⁵

The reason for this decision was twofold.⁶⁶ First, the Court explained that those who belong to a church implicitly consent to the church's superior organization's ability to make their own determinations without interference from civil courts.⁶⁷ Second, the Court held that this was not a case where the disputed property was devised by a specific individual who wanted to retain control, but rather the property was purchased by the church for the congregation, so long as the congregation remained part of the church.⁶⁸ The Court's decision to allow the church tribunal to determine the rightful congregation represents the historical practice of compulsory deference to religious institutions.⁶⁹ Compulsory deference was advocated because of the seeming inability to adjudicate religious institutions' property issues without violating constitutional protections.⁷⁰

In 1979, however, the Supreme Court established the current standard of civil justiciability in *Jones v. Wolf*, in which it declared civil courts competent in adjudicating any issue capable of analysis under neutral principles of law so long as it does not require a judgment regarding matters of theology or religious belief.⁷¹ Like *Watson*, *Jones* also involved a dispute over church property resulting from a schism in a local church that was part of a hierarchical church organization.⁷² In *Jones*, more than half of the congregation voted to separate from the larger church government and unite with another denomination.⁷³ After the superior church body formed a commission to investigate the schism within the local church, it issued a ruling that the minority faction—which opposed the break—was the true congregation.⁷⁴ The conflict over property ownership surfaced when the superior church body withdrew authority from the majority faction.⁷⁵ Ultimately, the current standard for resolving controversies about the

⁶⁵ *Id.* at 727.

⁶⁶ *Id.* at 726, 729.

⁶⁷ *Id.* at 729.

⁶⁸ *Watson*, 80 U.S. at 726.

⁶⁹ *Id.* at 727.

⁷⁰ *Id.*

⁷¹ See *Jones*, 443 U.S. at 603–05; BASSETT, *supra* note 1, § 7:22.

⁷² *Jones*, 443 U.S. at 598.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.* at 598–99.

ownership of church assets simply requires a determination of who is the legal owner of the property in question.⁷⁶

This current standard replaced the previous standard of compulsory deference to church bodies as seen in *Watson*.⁷⁷ The earlier practice of compulsory deference was based on the notion that because a religious institution was involved in a property dispute, the dispute was inherently religious in nature and therefore nonjusticiable by civil courts.⁷⁸ The modern standard represents the revised understanding that church property disputes can be settled with neutral principles of law.⁷⁹

In 2004, in *Akoury v. Roman Catholic Archbishop of Boston*, a Massachusetts Superior Court contributed to the concept of neutral principles of law.⁸⁰ The *Akoury* decision specifies that the application of neutral principles of law will be most applicable in those cases where plaintiffs can show a strong property interest.⁸¹ The court concluded that the plaintiffs' challenge regarding ownership of church property was a pretext for a challenge against the Archbishop's decision to suppress a local parish.⁸² The court determined that the decision to suppress a parish is inherently an ecclesiastical decision and therefore nonjusticiable by civil courts.⁸³ The court reasoned that when the plaintiff has a strong property interest, the court will more likely address the underlying property dispute and less likely claim the dispute involves nonjusticiable issues.⁸⁴ Thus, *Akoury* adds to the foundation of neutral principles in two ways.⁸⁵ First, it highlights that the way an argument is framed is key to whether a court will adjudicate the issue.⁸⁶ For example, in this case the court determined that the plaintiff's argument sounded less like a property dispute and more like a challenge against parish suppression.⁸⁷ Second, it indicates that the extent of the plain-

⁷⁶ See *id.* at 610; BASSETT, *supra* note 1, § 7:22.

⁷⁷ See *Jones*, 443 U.S. at 605; *Watson*, 80 U.S. at 727.

⁷⁸ See *Jones*, 443 U.S. at 604; *Watson*, 80 U.S. at 706.

⁷⁹ See *Jones*, 443 U.S. at 603.

⁸⁰ See generally *Akoury v. Roman Catholic Archbishop of Boston*, 18 Mass. L. Rptr. 271 (Mass. Super. 2004).

⁸¹ See *id.* at 272. In *Akoury*, the plaintiffs were claiming title to the church grounds, the church, furniture, religious items, and \$200,000 held in the parish accounts donated by the parish members. *Id.* at 271.

⁸² See *id.* at 272.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *Akoury*, 18 Mass. L. Rptr. at 272.

⁸⁶ See *id.* at 271-72.

⁸⁷ See *id.* at 272.

tiff's property interest also affects the court's decision of whether to adjudicate the issue—the stronger the plaintiff's claim to the property, the more likely the court will solve the dispute.⁸⁸

III. SECULAR PRINCIPLES APPLIED TO PROPERTY DISPUTES

A. Deference, Neutral Principles of Law, and Severability

When it comes to the resolution of church disputes, civil courts have developed two basic approaches.⁸⁹ The first approach requires the court to adhere to the notion of judicial deference whereby it protects and implements the decision reached by the church-designated ecclesiastical tribunal.⁹⁰ The second approach involves the court adjudicating the given property dispute by applying a secular, that is, religiously neutral, analysis.⁹¹

Courts followed the compulsory deference approach as spelled out by the Supreme Court in 1872 in *Watson v. Jones* for over one hundred years.⁹² At issue in *Watson* was whether the governing body of the Presbyterian Church had the power to prescribe qualifications for local church offices and determine which faction of a local church was entitled to the church property in dispute.⁹³ The Supreme Court in *Watson* held that the governing body of the church had such power, thereby creating the doctrine of judicial deference to the internal decision-making body of a church.⁹⁴

The Supreme Court indicated that the rule of judicial deference prevented the entanglement of church and state by providing religious institutions with the power to decide questions of religious belief, church discipline, and ecclesiastical government without state interference.⁹⁵ Additionally, whenever questions of faith and custom had been determined by the ecclesiastical tribunal, civil courts had to accept the decisions as final and binding upon them.⁹⁶ The rule of deference requires courts to defer to the internal decisions of church

⁸⁸ See *id.*

⁸⁹ See *Jones v. Wolf*, 443 U.S. 595, 604–05 (1979); BASSETT, *supra* note 1, § 7:23.

⁹⁰ See *Jones*, 443 U.S. at 604; BASSETT, *supra* note 1, § 7:23.

⁹¹ See *Jones*, 443 U.S. at 604; BASSETT, *supra* note 1, § 7:23.

⁹² See *Watson v. Jones*, 80 U.S. 679, 706 (1872); BASSETT, *supra* note 1, § 7:23.

⁹³ See *Watson*, 80 U.S. at 717; BASSETT, *supra* note 1, § 7:23.

⁹⁴ See *Watson*, 80 U.S. at 706; BASSETT, *supra* note 1, § 7:23.

⁹⁵ See *Watson*, 80 U.S. at 733; BASSETT, *supra* note 1, § 7:23.

⁹⁶ See *Watson*, 80 U.S. at 733; BASSETT, *supra* note 1, § 7:23.

authorities when such decisions are exclusively linked to the fundamental beliefs and interpretation of church law.⁹⁷

This deferential approach by courts changed, however, when, in 1979, the Supreme Court adopted the neutral principles of law approach in *Jones v. Wolf*.⁹⁸ In *Jones*, the Court held that states may adopt such neutral principles in adjudicating the resolution of church property disputes without violating constitutional safeguards.⁹⁹ The Court indicated, however, that in order for states to comply with the First Amendment's religious clauses, civil courts must defer to ecclesiastical tribunals—if they exist—concerning matters of religious doctrine and polity.¹⁰⁰

Courts need not, however, follow a rule of compulsory deference to ecclesiastical authorities in resolving church property disputes where there is an absence of religious doctrine or polity concerning the issue in dispute.¹⁰¹ Where no doctrinal controversy is involved, civil courts are entitled to follow neutral principles of law to interpret relevant provisions of a religious organization's governing documents—such as deeds, church constitutions, bylaws, and contracts—under current state law.¹⁰²

The neutral principles of law approach benefits those challenging a church because it is completely secular in operation and elastic enough to be applied to various religious organizations.¹⁰³ Another advantage of this approach is the ease with which courts can determine whether or not it can be applied.¹⁰⁴ For example, when the interpretation of deeds, charters, bylaws, or church constitutions would require a civil court to resolve disputes regarding religious doctrine, it is easily determined that neutral principles of law cannot be applied to interpret the case in accordance with the First Amendment.¹⁰⁵ In

⁹⁷ See *Jones*, 443 U.S. at 604; BASSETT, *supra* note 1, § 7:23.

⁹⁸ See *Jones*, 443 U.S. at 603–05; BASSETT, *supra* note 1, § 7:32.

⁹⁹ See *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 7:32.

¹⁰⁰ See U.S. CONST. amend. I; *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 7:32 (citing Peter M. Shannon, *Deference or Neutral Principles: The Dual Approach by Civil Courts to Ecclesiastical Disputes*, 49 PROCEEDINGS CLSA 106 (1987)).

¹⁰¹ See *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 7:32 (citing Peter M. Shannon, *Deference or Neutral Principles: The Dual Approach by Civil Courts to Ecclesiastical Disputes*, 49 PROCEEDINGS CLSA 106 (1987)).

¹⁰² See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32 (citing Peter M. Shannon, *Deference or Neutral Principles: The Dual Approach by Civil Courts to Ecclesiastical Disputes*, 49 PROCEEDINGS CLSA 106 (1987)).

¹⁰³ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹⁰⁴ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹⁰⁵ See U.S. CONST. amend. I; *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 7:32.

such an event, the court must still defer to authoritative ecclesiastical bodies.¹⁰⁶ Because the neutral principles of law approach relies exclusively upon objective, well-established concepts of property, trust, and contract law, subject matter familiar to lawyers and judges, the *Jones* Court concluded that civil courts, in adhering to these norms, could avoid entanglement in religious doctrine, polity and practice.¹⁰⁷

As part of the concept of neutral principles of law, *Jones* also discusses severability.¹⁰⁸ The concept of severability relates to a civil court's ability to address church property disputes through the lens of secular trust and property law rather than defer to ecclesiastical tribunals.¹⁰⁹ So long as civil courts rely on objective and well-established concepts of law, which do not require judicial interpretation of religious doctrine, civil courts may identify the proper legal owner of church assets without running afoul of the First Amendment.¹¹⁰ After *Jones*, civil courts have broad discretion to resolve church property disputes by relying on secular legal principles from other areas of the law.¹¹¹

Interestingly, the Court in *Jones* explicitly outlined ways in which churches can avoid having church disputes settled in civil courts.¹¹² The Court suggested redrafting church constitutions, charters, and other documents to make clear, in religious terms, who controls the property, thereby leaving civil courts no choice but to uphold church designations.¹¹³ The Supreme Court indicated that through explicit provisions, churches could define what happens to the disposition of property for any number of given doctrinal controversies.¹¹⁴ Additionally, the Supreme Court clarified that a civil court would have to defer to a hierarchical church's tribunal's jurisdiction if the church had property distribution policies in place and the tribunal was operating with procedural regularity.¹¹⁵

For a church to shield successfully its decisions from civil adjudication, it must have documents that clearly present the procedures by which church decisions are made and express religious justifications

¹⁰⁶ See *Jones*, 443 U.S. at 604.

¹⁰⁷ See *id.* at 603.

¹⁰⁸ See *id.*; BASSETT, *supra* note 1, § 7:32.

¹⁰⁹ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹¹⁰ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹¹¹ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹¹² See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

¹¹³ See *Jones*, 443 U.S. at 604; BASSETT, *supra* note 1, § 7:32.

¹¹⁴ See *Jones*, 443 U.S. at 603.

¹¹⁵ See *id.*; BASSETT, *supra* note 1, § 7:32.

for the sources of authority or the purposes of particular decisions.¹¹⁶ In order to secure this constitutional safeguard, however, the basic documents must demonstrate a clear self-understanding as portrayed by the religious body.¹¹⁷ For the church to demonstrate its religious self-understanding, the church must show that its religious values are so entwined with the institution's governance that civil adjudication is precluded.¹¹⁸ In order for the church to take advantage of First Amendment freedoms, the church must convince a civil court that religious overtones pervade the entire property dispute, preventing the court from severing the property dispute and applying secular principles of law.¹¹⁹

Hierarchical religious institutions (such as the Roman Catholic and Episcopal Churches) organized as corporations sole thus have the ability to shield property disputes from civil courts.¹²⁰ Such entities can do so by combining religious doctrine with organizational documents that address the adjudication and resolution of such issues.¹²¹ When church property is insulated in this manner, civil courts must defer to the religious decision-making body in order to comply with the First Amendment.¹²² Alternatively, when a hierarchical church organized as a corporation sole has neglected to indicate in its religious and organizational documents an intent to resolve church property disputes internally, a civil court may adjudicate the issue without violating the Establishment and Free Exercise Clauses by applying neutral principles of law and severability.¹²³

B. *Secular Principles*

Because civil courts can adjudicate some property disputes by applying secular principles of law, such as property and trust law, it is necessary to understand how courts apply these principles to resolve specific issues.¹²⁴ This Note aims to help plaintiffs prevent, retrospectively or prospectively, property gifted to their local parish from being

¹¹⁶ See *Jones*, 443 U.S. at 603-04; EDWARD MCGLYNN GAFFNEY, JR. & PHILIP C. SORESENSEN, *ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS* 99 (HOWARD GRIFFIN ED., 1984).

¹¹⁷ See *Jones*, 443 U.S. at 603-04; GAFFNEY & SORESENSEN, *supra* note 116, at 99.

¹¹⁸ See *Jones*, 443 U.S. at 603-04; GAFFNEY & SORESENSEN, *supra* note 116, at 99-100.

¹¹⁹ See U.S. CONST. amend. I; *Jones*, 443 U.S. at 604.

¹²⁰ See *Jones*, 443 U.S. at 603-04; BASSETT, *supra* note 1, § 7:23.

¹²¹ See *Jones*, 443 U.S. at 603-04, 606; BASSETT, *supra* note 1, § 7:23.

¹²² See U.S. CONST. amend. I; *Jones*, 443 U.S. at 605; BASSETT, *supra* note 1, § 7:23.

¹²³ See U.S. CONST. amend. I; *Jones*, 443 U.S. at 602; BASSETT, *supra* note 1, § 7:32.

¹²⁴ See *Jones*, 443 U.S. at 603.

transferred to the archdiocese of a hierarchical church upon suppression of the local parish. This necessitates a discussion of the doctrine of *cy pres*, which allows courts to interpret a will so as to carry out the testator's intentions expressed therein.¹²⁵

When a testator leaves property in trust for charitable purposes, the trust does not necessarily fail because the testator has failed to state the particular charitable purpose to which the property is to be applied.¹²⁶ The trust fails, however, when the testator manifests an intention that the property is only to be used for a particular charitable purpose, yet fails to manifest properly that specific charitable intention.¹²⁷ When a testator has not manifested an intention to devote property to charitable purposes generally, but has manifested an intention to devote it to a particular charitable purpose, the intended charitable trust fails if the particular charitable purpose cannot be accomplished.¹²⁸

For example, if a testator left property in trust for his or her local parish stating that he or she intended the property to benefit anybody interested in the teachings of Catholicism generally, the trust would not fail because the testator did not indicate a specific use for the property.¹²⁹ The gift survives because the testator stated a general intent to benefit religion and did not condition the gift upon a particular use only.¹³⁰ This is not the case, however, where a testator specifically leaves property to benefit his or her local parish.¹³¹ In the latter case, the testator has clearly manifested a specific intent—to benefit the local parish—limiting the scope of the charitable purpose, but failing to indicate the exact condition. Because the testator did not express a general intent to promote religion, but did express a specific intent to benefit his or her local parish, the gift must fail because of a lack of specification regarding the charitable purpose.¹³²

¹²⁵ See *Evans v. Abney*, 396 U.S. 435, 441 (1970).

¹²⁶ See *Evans*, 396 U.S. at 441; AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 395 (4th ed. 1989).

¹²⁷ See SCOTT & FRATCHER, *supra* note 126, § 395.

¹²⁸ See *Evans*, 396 U.S. at 441; SCOTT & FRATCHER, *supra* note 126, § 395.

¹²⁹ See *Evans*, 396 U.S. at 440. The hypotheticals are the Author's creation.

¹³⁰ See *id.*

¹³¹ See *id.* at 441.

¹³² See *id.*

1. Cy Pres

In situations where it becomes impossible or impractical to carry out the testator's wishes, cy pres can be used to modify the testator's intention and achieve results that most closely resemble the testator's intentions.¹³³ Cy pres is an equitable doctrine that allows courts to modify a testator's gift to mirror what the testator would have wanted when it becomes impossible to carry out the testator's exact provision.¹³⁴ Although a lack of specific charitable purpose may cause a gift to fail, courts may apply the doctrine of cy pres when attempting to save a charitable trust.¹³⁵ Thus, the central analysis in a case where cy pres is applicable concerns the testator's intent, which is a question of fact.¹³⁶ Courts do not apply cy pres in every case when a testator's wishes cannot be successfully fulfilled.¹³⁷ For instance, in some situations, the testator had only one particular purpose in mind, and no expressed general charitable intent.¹³⁸ In such cases, it is impossible to accomplish the particular purpose, leaving courts to presume that the testator would have preferred the trust to fail entirely, causing the assets to revert to the testator's heirs.¹³⁹

When the testator includes contingency provisions in case the testator's intent cannot be carried out, those provisions are controlling.¹⁴⁰ When the testator does not, however, include any contingency language, courts must determine whether the gift fails entirely or whether the doctrine of cy pres should be applied.¹⁴¹ Courts have held that cy pres is inapplicable when a testator clearly intended the property to be put to a particular use or for the benefit of a particular organization that has since dissolved. In such instances, the property should revert to the testator's estate.¹⁴² If a testator leaves property in trust, however, for a particular charitable purpose that is incapable of

¹³³ See *id.* at 440.

¹³⁴ See *Evans*, 396 U.S. at 440.

¹³⁵ See *id.*; *Obermeyer v. Bank of Am.*, 140 S.W.3d 18, 23 (Mo. 2004). While cy pres was originally used to save gifts in trust, it has been extended and applied to absolute gifts to charitable corporations or other organizations. See *Obermeyer*, 140 S.W.3d at 23 (citing *GEORGE T. BOGERT, TRUSTS AND TRUSTEES*, § 431, 105 (2d ed. 1991)); *SCOTT & FRATCHER, supra* note 126, § 399.

¹³⁶ See *Obermeyer*, 140 S.W.3d at 22.

¹³⁷ See *Evans*, 396 U.S. at 441.

¹³⁸ See *id.*

¹³⁹ See *id.* at 444.

¹⁴⁰ See *id.*; *SCOTT & FRATCHER, supra* note 126, § 399.2.

¹⁴¹ See *Evans*, 396 U.S. at 440.

¹⁴² See *id.* at 444.

being executed, the trust will not fail if the testator demonstrated a broad, general intention to devote the property to charitable purposes.¹⁴³ In such a case, the court will utilize cy pres to dispose of the property in line with the testator's ascertained intention.¹⁴⁴

For example, if a testator left money in trust to a local parish which was suppressed shortly after the testator's death, a court could determine that the testator possessed a general intention to devote the property to charitable purposes, and therefore provide the money to a successor parish.¹⁴⁵ The other possible outcome is that the court may assume the testator wanted to benefit the broader archdiocese in the event of a suppression of the testator's local parish.¹⁴⁶ If the court determines, however, that the testator only wanted the money to go to the local parish, then upon its suppression, and in the absence of a more general intent to promote religion, the gift must fail and the money must revert to the testator's estate.¹⁴⁷

2. Ambiguities and Extrinsic Evidence

Other secular tools that courts apply when analyzing church property disputes include the doctrines of judicial construction and interpretation of wills.¹⁴⁸ The fundamental legal principles of judicial construction and interpretation of wills are vital when it comes to in-

¹⁴³ See *id.* at 441; SCOTT & FRATCHER, *supra* note 126, § 399.2.

¹⁴⁴ See *Evans*, 396 U.S. at 441.

¹⁴⁵ See *Obermeyer*, 140 S.W.3d at 26 (determining where money left by testator should go after the original recipient, the Dental Alumni Development Fund, ceased to exist upon the closure of Washington University Dental School).

¹⁴⁶ See *id.* This hypothetical is analogous to the court's decision in *Obermeyer v. Bank of America* to use cy pres and give the money to Washington University generally, despite the fact that the conditional gift failed when the dental school closed and the specific Dental Fund ceased to exist. See *id.* The decision to give the money to Washington University hinged upon the court's finding that the testator possessed general, rather than specific, charitable intent despite contrary language indicating his intent to benefit the Dental Fund specifically. See *id.* This situation, however, is distinguishable from the one proposed in this Note regarding a testator's gift to their local parish for two reasons. First, the deceased in *Obermeyer* made unrestricted donations throughout his life to Washington University generally without any conditions regarding the dental school or the Dental Fund. See *id.* Second, the remainder of his estate was left to Washington University generally—a clear intention to benefit more than just the dental school. See *id.* Thus, the court's ability to find general intent in the face of narrowly tailored language lies in the court's analysis of the testator's intent as determined from a lifetime of giving to the University. See *id.*

¹⁴⁷ See *Evans*, 396 U.S. at 444 (holding that because testator gifted and demonstrated specific intent of leaving public park to white people only, testator would rather have gift fail and revert to his heirs than be a racially integrated park).

¹⁴⁸ See *id.* at 440; *Obermeyer*, 140 S.W.3d at 25–26; GEORGE W. THOMPSON, CONSTRUCTION AND INTERPRETATION OF WILLS § 83 (1928).

interpreting testamentary documents.¹⁴⁹ In cases where the testator's intent is clear and can be inferred from the will itself, but the testator has omitted certain words necessary to express fully his intention, courts will supply the necessary words by implication to bring about the result the testator intended.¹⁵⁰

For example, if a testator bequeathed money to the local parish, conditioned on the fact that the parish remain in existence, courts may infer that, should the parish be suppressed, the testator intended the gift to revert back to the testator's heirs based on the will itself.¹⁵¹ Under these circumstances, a court will supply the missing language.¹⁵² Courts may not read language into a will, however, unless the court finds that the testator's intentions are clearly inferable from the will itself, although perhaps not appropriately expressed.¹⁵³

When applying a provision in the testator's will to actual circumstances, events often occur after the testator's death that call into question the testator's intent.¹⁵⁴ In cases where the testator's intent cannot clearly be ascertained from the content of the will, a court may consider additional facts and circumstances existing at the time of the will's execution to ascertain the testator's intent.¹⁵⁵ The court should thus step into the shoes of the testator and consider the circumstances influencing the testator when the will was executed.¹⁵⁶

When circumstances change after a testator's death, ambiguities often result.¹⁵⁷ There are two kinds of ambiguities—patent and latent.¹⁵⁸ A patent ambiguity is one that appears on the face of the will itself, preventing a court from interpreting the testator's intent.¹⁵⁹ A latent ambiguity, in contrast, arises out of a document that is comprehensible on its face, but becomes unclear when its terms are applied

¹⁴⁹ See *Evans*, 396 U.S. at 440; *Obermeyer*, 140 S.W.3d at 25–26; THOMPSON, *supra* note 148, § 83.

¹⁵⁰ See *Baker-Boyer Nat'l Bank v. Henricksen*, 46 F. Supp. 831, 836 (D.C. Cir. 1942); THOMPSON, *supra* note 148, § 83.

¹⁵¹ This is the Author's own hypothetical.

¹⁵² See *Henricksen*, 46 F. Supp. at 836; THOMPSON, *supra* note 148, § 83.

¹⁵³ See *Henricksen*, 46 F. Supp. at 834; THOMPSON, *supra* note 148, § 83.

¹⁵⁴ See *Obermeyer*, 140 S.W.3d at 21; THOMPSON, *supra* note 148, § 217.

¹⁵⁵ See *Obermeyer*, 140 S.W.3d at 26; THOMPSON, *supra* note 148, § 217.

¹⁵⁶ See *Evans*, 396 U.S. at 441; THOMPSON, *supra* note 148, § 217.

¹⁵⁷ See *Evans*, 396 U.S. at 437; *Obermeyer*, 140 S.W.3d at 22; THOMPSON, *supra* note 148, § 327.

¹⁵⁸ See *Bradley v. Wash., Alexandria & Georgetown Steam-Packet Co.*, 38 U.S. 89, 97 (1839); THOMPSON, *supra* note 148, § 327.

¹⁵⁹ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 327.

to specific circumstances.¹⁶⁰ Most courts hold that extrinsic evidence cannot be introduced to resolve patent ambiguities.¹⁶¹ In contrast, for latent ambiguities where the will itself is free from defect, extrinsic evidence can be introduced to clarify the testator's intent.¹⁶²

Examples of extrinsic evidence that the court should take into consideration when clarifying the testator's intent include the testator's thought habits, the testator's relationship to, or associations with, the bounty, and the testator's motives.¹⁶³ Even though the testator's intention must be found in the will, courts are able to infer the meaning of the words in the will by taking into account various circumstances that affected and motivated the testator at the time of execution.¹⁶⁴ Although extrinsic evidence of surrounding circumstances cannot be used to assert an intention differing from that expressed in the will, extrinsic evidence is properly used as an aid in proving the correct understanding of the will's language.¹⁶⁵

Interpreting and applying extrinsic evidence is particularly relevant to the successful application of *cy pres*.¹⁶⁶ When a testator's will indicates an exact duty to be performed, and it then becomes impossible to perform that duty, the doctrine of *cy pres* is used to accomplish the testator's intent as best as possible.¹⁶⁷ There is often confusion and controversy in testamentary gifts to religious or charitable organizations, and for that reason, when applying the doctrine of *cy pres* to religious purposes, the general rule is to apply extrinsic facts and circumstances so as to give effect to the testator's intent.¹⁶⁸ Because it is critical to accomplishing the testator's ultimate purpose, interpreting testamentary documents requires discerning the testator's intent—that is, what the testator would have wanted if aware that the provision could not be carried out.¹⁶⁹ Thus, a court should con-

¹⁶⁰ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 327.

¹⁶¹ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 327. Extrinsic evidence is information from outside the will which is used to help construe the true intent of the testator. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 420 (6th ed. 2000).

¹⁶² See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 327.

¹⁶³ See *Obermeyer*, 140 S.W.3d at 26; THOMPSON, *supra* note 148, § 217.

¹⁶⁴ See *Obermeyer*, 140 S.W.3d at 26; THOMPSON, *supra* note 148, § 217.

¹⁶⁵ See *Obermeyer*, 140 S.W.3d at 26; THOMPSON, *supra* note 148, § 217.

¹⁶⁶ See *Obermeyer*, 140 S.W.3d at 26; THOMPSON, *supra* note 148, § 217.

¹⁶⁷ See *Evans*, 396 U.S. at 440; THOMPSON, *supra* note 148, § 142.

¹⁶⁸ See *Obermeyer*, 140 S.W.3d at 23; THOMPSON, *supra* note 148, § 144.

¹⁶⁹ See *Obermeyer*, 140 S.W.3d at 25.

sider all the relevant surrounding circumstances, as embodied by extrinsic evidence, in determining the testator's intent.¹⁷⁰

IV. ANALYSIS: RESOLVING CHURCH PROPERTY DISPUTES THROUGH APPLICATION OF NEUTRAL PRINCIPLES

The application of neutral principles is the accepted method for determining which faction involved in a church schism is the rightful owner of church property.¹⁷¹ This Note argues that this approach should be extended to situations involving gifts by individuals to churches, thereby preserving testator intent and preventing an archdiocese or similar body from claiming gifted property. In deciding which faction is the true representative of a hierarchical church, a judgment often requires ecclesiastical determinations, something a civil court cannot make.¹⁷² The Supreme Court, however, has stated that where church bodies have not created their own guidelines for property dispute resolutions, states are free to so do, so long as the investigation is free from religious determinations.¹⁷³ Therefore, in cases involving individuals, rather than factions, where no or inadequate church guidelines exist for property dispute resolutions, neutral principles should apply.¹⁷⁴ This Note also offers practical advice for donors who are retroactively trying to regain control of their property and for donors who prospectively want to guarantee their gifts are used according to their specific wishes.

A. Defense of Neutral Principles and Support for Its Extension

1. The Policy Justification for Applying Neutral Principles in Intra-Church Disputes and for Extending It

The Supreme Court has given civil courts the ability to use neutral principles of law while steering clear of religious controversy in the context of determining which church faction is entitled to the use and control of church property.¹⁷⁵ There are inherently religious overtones in determining which church faction actually controls the church in contrast to the lack of any religious overtones in determin-

¹⁷⁰ See *id.* at 26.

¹⁷¹ See *Watson v. Jones*, 80 U.S. 679, 703 (1872).

¹⁷² See *Jones v. Wolf*, 443 U.S. 595, 607 (1979).

¹⁷³ See *id.* at 602.

¹⁷⁴ See *id.*

¹⁷⁵ See *Watson*, 80 U.S. at 725.

ing whether a particular gift made by a testator's will should fail.¹⁷⁶ Analysis regarding who is entitled to use and enjoy church property in an intra-church dispute relies mostly upon the analysis of relevant church documents, which are used to decide which faction actually represents the church. In contrast, a determination of whether a church should be allowed to keep a bequest relies more heavily upon the law of wills and trusts.¹⁷⁷

The policy reason for enforcing the neutral principles of legal analysis in intra-church disputes—that is, the state's interest in peaceful resolution of property disputes—applies even more forcefully to settling disputes between a religious body and an individual.¹⁷⁸ This is because of the drastic reduction of religious inquiries required in a property dispute.¹⁷⁹ In 1979, in *Jones v. Wolf*, the Supreme Court indicated that states have a legitimate interest in providing a civil forum for the peaceful resolution of church property disputes while being mindful of resolving such disputes outside the auspices of religious doctrine and practice.¹⁸⁰ The Supreme Court thus required deference when religious institutions have already designated that property disputes are to be resolved within the ecclesiastical body, but explicitly stated that states may otherwise adopt various approaches to resolving these property disputes.¹⁸¹ Applied to cases where gifts have been made, where no religious inquiries are necessary, neutral principles should apply.¹⁸²

2. Applying Neutral Principles Beyond Intra-Church Disputes

Opponents of the neutral principles approach believe that it is inappropriate to inquire into the proper ownership of property gifted to a soon-to-be suppressed local parish.¹⁸³ This school of thought views the decision to suppress a parish as an internal church decision, inherently religious in nature.¹⁸⁴

¹⁷⁶ See *Evans v. Abney*, 396 U.S. 435, 440 (1970); *Watson*, 80 U.S. at 706.

¹⁷⁷ See *Evans*, 396 U.S. at 439; *Watson*, 80 U.S. at 706.

¹⁷⁸ See *Watson*, 80 U.S. at 726; *Akoury v. Roman Catholic Archbishop of Boston*, 18 Mass. L. Rptr. 271, 272 (Mass. Super. 2004).

¹⁷⁹ See *Evans*, 396 U.S. at 439; *Watson*, 80 U.S. at 706.

¹⁸⁰ See *Jones*, 443 U.S. at 602.

¹⁸¹ See *id.*

¹⁸² See *Watson*, 80 U.S. at 726; *Akoury*, 18 Mass. L. Rptr. at 272.

¹⁸³ See *Akoury*, 18 Mass. L. Rptr. at 272.

¹⁸⁴ See *id.*

In *Akoury v. Roman Catholic Archbishop of Boston*, the plaintiffs—members of a local parish that was part of the Roman Catholic Church—attempted to enjoin the Archbishop of Boston from liquidating, transferring, and conveying to the office of the Archbishop, property allegedly held in trust for the benefit of the local parish.¹⁸⁵ In focusing on the important role that the local parish played in the plaintiffs' lives as a place to celebrate life and death, the Massachusetts Superior Court viewed the plaintiffs' claim as an attempt to prevent parish suppression.¹⁸⁶ Because the court viewed this suit as an attempt to halt suppression, it focused on the religious nature of the decision to close a parish.¹⁸⁷ The court concluded that closing a parish is a matter best left to the Archbishop.¹⁸⁸ The Superior Court also indicated that because the Roman Catholic Church is hierarchical in structure and a corporation sole, the parish assets were held in custody for the benefit of the Archdiocese by its agent, the pastor of the local parish.¹⁸⁹

The *Akoury* court's holding—that the decision to close a parish is inherently religious—appears at first to frustrate a plaintiff's attempt to regain control of conditionally gifted property.¹⁹⁰ This holding, however, is not applicable to the situations this Note considers, which involve testators who want to prevent an archdiocese from claiming their property.¹⁹¹

For one, in *Akoury*, the court framed the legal issue in terms of the plaintiffs trying to prevent parish suppression, which is an inherently religious issue that civil courts cannot hear.¹⁹² The legal issue present in the case of a plaintiff who gifts property to their local parish for its use only is not a religious question touching suppression of the congregation in the first place.¹⁹³ Rather, the legal issue is the purely secular question of who has title to the property when the beneficiary of the gift ceases to exist as was required, either expressly or implicitly, in the gift provision itself.¹⁹⁴

¹⁸⁵ See *id.* at 271.

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 272.

¹⁸⁸ See *Akoury*, 18 Mass. L. Rptr. at 272.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See *Akoury*, 18 Mass. L. Rptr. at 272.

¹⁹⁴ See *Jones*, 443 U.S. at 603–04.

Additionally, there is an unspoken issue that pervades the *Akoury* case which distinguishes *Akoury* from cases involving gifted property.¹⁹⁵ Nowhere in *Akoury* is it indicated that the plaintiffs had any interest in the disputed property aside from their previous use of it.¹⁹⁶ In other words, potential plaintiffs have a truly legitimate interest in property they owned and conditionally gifted to the local parish, whereas the *Akoury* plaintiffs merely wanted to keep the property which they had become accustomed to using.¹⁹⁷ For this reason, their attempt to frame the dispute as one over property failed.¹⁹⁸

There is thus a fundamental difference between the plaintiffs in *Akoury* and those who are attempting to regain control over property gifted to a church.¹⁹⁹ Unlike the plaintiffs in *Akoury* who challenged the Archdiocese's decision to suppress their local parish and tried to retain control over property that possibly did not belong to them, plaintiffs who are trying to regain control over property that is rightfully theirs, rather than challenging suppression, do not present a legal question that is religious in nature.²⁰⁰ Rather, they present a clear case for the application of neutral principles of the law of property, wills, and trusts.²⁰¹

B. Preventing the Archdiocese from Claiming Gifted Property

Because of the corporate structure of hierarchical churches and the religious freedoms guaranteed under the First Amendment of the Constitution, plaintiffs have limited room to maneuver when it comes to preventing the archdiocese from claiming gifted property upon suppression of their local parish.²⁰² There is an inherent tension that exists between what a hierarchical church can do with certain property and the legal significance of interpreting the testator's intent in gifting that same property.²⁰³

¹⁹⁵ See *Akoury*, 18 Mass. L. Rptr. at 272.

¹⁹⁶ See *id.* at 271-72.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* at 272.

¹⁹⁹ See *id.*

²⁰⁰ See *Akoury*, 18 Mass. L. Rptr. at 272.

²⁰¹ See *Jones*, 443 U.S. at 603.

²⁰² See U.S. CONST. amend. I; BASSETT, *supra* note 1, § 3:2.

²⁰³ Compare BASSETT, *supra* note 1, § 3:2 (stating that hierarchical institutions have the ability under the First Amendment to insulate decisions regarding property disputes by intertwining dispute-solving mechanisms with religious polity), with THOMPSON, *supra* note 148, § 83 (stating that, when determining the proper disposition of a testator's property, the testator's intent is the controlling authority).

Unfortunately for plaintiffs, where the hierarchical church has clearly chosen to designate in its religious charters, incorporation documents, and bylaws the method by which all property disputes are handled by the ecclesiastical tribunal, civil courts will probably not be able to adjudicate the matter by applying neutral principles of law.²⁰⁴ The Supreme Court has indicated that when religious institutions so commingle their religious doctrine with dispute-solving mechanisms, it would be a violation of the First Amendment for any civil court to attempt to alter the ecclesiastical tribunal's resolution of the dispute.²⁰⁵

It appears that challenges to the disposition of gifts already made to soon-to-be suppressed local parishes will be limited to those situations where the hierarchical church has not clearly indicated in its relevant documents the manner in which property disputes are to be adjudicated.²⁰⁶ In these cases, religion is not so intertwined with the disposition of the disputed property so as to prevent a civil court from applying neutral principles of law.²⁰⁷ It is within these confines that plaintiffs have the ability to argue the legal importance of intent so as to prevent the property from going to the archdiocese.²⁰⁸

Under neutral principles of law, a civil court can turn to legal concepts with which it is familiar, mainly property, trusts, and wills.²⁰⁹ Because the testator's intent is the single-most important determination of disposal of gifted property, plaintiffs should focus their arguments here.²¹⁰ Donors who intend to benefit their local parish or a successor parish but not the archdiocese must know what to do both prospectively and retrospectively to ensure they succeed in accomplishing their goals.

1. Prospective Protection of Donor's Intent

Although the doctrine of *cy pres* can be applied to a will to achieve results similar to those that the testator intended, use of unambiguous language is preferred.²¹¹ In order to avoid a situation in which a court finds broad charitable intent such that upon the suppression of a local parish the court assumes the testator would have wanted the bequest to

²⁰⁴ See *Watson*, 80 U.S. at 733; BASSETT, *supra* note 1, § 3:2.

²⁰⁵ See U.S. CONST. amend. I; *Watson*, 80 U.S. at 733; BASSETT, *supra* note 1, § 3:2.

²⁰⁶ See *Jones*, 443 U.S. at 603; BASSETT, *supra* note 1, § 7:32.

²⁰⁷ See *Jones*, 443 U.S. at 603-04; BASSETT, *supra* note 1, § 7:32.

²⁰⁸ See *Jones*, 443 U.S. at 603-04; BASSETT, *supra* note 1, § 7:32.

²⁰⁹ See *Jones*, 443 U.S. at 603-04; BASSETT, *supra* note 1, § 7:32.

²¹⁰ See *Evans*, 396 U.S. at 442.

²¹¹ See *id.* at 440-41.

transfer to the archdiocese or similar body, it is necessary that the testator indicate where the property is and is not to go.²¹²

Potential testators seeking to benefit simultaneously a local parish and prevent the transfer of money to the archdiocese must be explicit in any gift provision.²¹³ If a general charitable intent is ascertained in a gift provision to a local parish such that a court can apply the doctrine of cy pres, the testator must indicate that in the event of the parish's suppression, the testator's intent is limited to the benefit of a successor parish, not the archdiocese or similar body.²¹⁴ Testators must accordingly carefully limit the extent of their intended generosity.²¹⁵ Otherwise, a finding of general intent to promote religion might lead a court to award erroneously the money to the archdiocese in the absence of the testator's clear intention not to do so.²¹⁶

2. Retrospective Protection of Donor's Intent

When a testator leaves money to a local parish that is later suppressed, it is proper for a court to use extrinsic evidence in order to prove under the circumstances that the testator would either have: (1) wanted the money to go to a successor parish; (2) wanted the money to revert to the testator's heirs; or (3) not have wanted the money to go to the archdiocese.²¹⁷ In any of these three situations, the use of extrinsic evidence does not infuse contradictory intention into the testator's will different from that expressed by the document, but rather clarifies dispersal of the gift in the case of a suppressed parish.²¹⁸

If a gift has already been made to a soon-to-be suppressed local parish and the archdiocese claims a right to the property, the ques-

²¹² See *Obermeyer v. Bank of Am.*, 140 S.W.3d 18, 26 (Mo. 2004).

²¹³ Compare *Evans*, 396 U.S. at 441-42 (holding that the testator left such detailed instructions in his will regarding the limits of his charitable purpose that he would prefer the gift to fail than be used otherwise), with *Obermeyer*, 140 S.W.3d at 26 (holding that the testator's intent was not specific enough to require the gift to fail upon the recipient's dissolution).

²¹⁴ See *Evans*, 396 U.S. at 441; *Obermeyer*, 140 S.W.3d at 26.

²¹⁵ See *Obermeyer*, 140 S.W.3d at 26.

²¹⁶ Compare *Evans*, 396 U.S. at 441-42 (holding that where the testator clearly manifested a specific intent that could not be fulfilled, the gift must fail), with *Obermeyer*, 140 S.W.3d at 26 (holding that a testator's stated intent to gift money to a university's dental fund was not limiting and specific enough to prevent the court from giving the money to the University as a whole).

²¹⁷ See *supra* notes 148-70 and accompanying text. This is a hypothetical situation, the content of which is supported by the previous discussion of the proper use of extrinsic evidence.

²¹⁸ See *Obermeyer*, 140 S.W.3d at 26.

tion becomes how to protect retrospectively the donor's intent. If the will does not expressly state what is to happen to the property upon suppression, a court may find the presence of a latent ambiguity.²¹⁹ A latent ambiguity is an ambiguity that arises not from a flaw in the will itself, but from changed external circumstances since the time the will was executed.²²⁰ In the case of latent ambiguities, courts often look to extrinsic evidence, such as the testator's motivations, so that it can step into the testator's shoes and modify the will accordingly.²²¹

Although extrinsic evidence of surrounding circumstances cannot be used to assert an intention different from that expressed in the will, it is properly used as an aid in proving the correct understanding of the utilized language.²²² Plaintiffs in this position must introduce evidence relating to the testator's motivation in making the disposition and the relationship between the testator and the beneficiary of the bounty, so as to leave no doubt that the testator's true intent was to benefit the local parish and not to promote religion generally.²²³

CONCLUSION

Religious institutions such as the Roman Catholic Church that are hierarchical in structure and organized as corporations sole are powerful entities. Because the First Amendment mandates separation of church and state, churches have the ability to insulate the decisions made by their adjudicative bodies in resolving property disputes. Churches can carefully craft their religious documents in a way that entangles church polity with ordinary property disputes, requiring civil courts to defer to ecclesiastical tribunals in compliance with the Constitution.

In situations where hierarchical churches have neglected to make religious documents part of the adjudicative process, however, or in cases where such church bodies have not shown an entwined relationship between property disputes and religious polity, civil courts can adjudicate church property disputes by applying neutral principles of law. In applying neutral principles of law, courts will refer to areas of law with which lawyers and judges are familiar. By referring to the law of property, trusts, and wills, courts analyze a testator's gift provisions

²¹⁹ See *Bradley v. Wash., Alexandria & Georgetown Steam-Packet Co.*, 38 U.S. 89, 97 (1839); THOMPSON, *supra* note 148, § 327.

²²⁰ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 327.

²²¹ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 217.

²²² See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 217.

²²³ See *Bradley*, 38 U.S. at 97; THOMPSON, *supra* note 148, § 217.

to determine the testator's intent when a particular provision is incapable of being satisfied.

The suppression of local parishes has brought the tension between a religious institution's autonomy and the need to satisfy a testator's intent to the public eye. There is limited room for potential plaintiffs to maneuver when it comes to preventing the archdiocese of a hierarchical church from capturing a local parish's assets when the hierarchical church has explicitly provided for the manner in which it will resolve property disputes. Where these provisions are lacking, however, plaintiffs seeking to control the disposition of property retrospectively must rely on the doctrine of *cy pres* and the admission of extrinsic evidence to clarify any latent ambiguities regarding a testator's intended beneficiaries. Those looking to control the disposition of property prospectively must explain the limited terms upon which the gift is being made, designate who are and are not the beneficiaries of the gift, and provide for the reversion of the gift to the testator's heirs should circumstances arise such that the testator's intent is frustrated.

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